No. 14-613

IN THE

Supreme Court of the United States

MARVIN GREEN,

Petitioner,

v.

MEGAN J. BRENNAN,
POSTMASTER GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF THE JUDGMENT BELOW

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on the question presented in this case: In a claim of constructive discharge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, does the administrative limitations period begin with the last discriminatory or retaliatory act of the employer, or does it begin instead with the employee's resignation?[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

Amicus is committed to ensuring a reasonable interpretation of federal statutes and regulations

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), amicus also states that counsel of record for the petitioner and for the respondent have both given their written consent to the filing of this brief, which amicus has filed herewith.

that determine the rights and duties of employers. In particular, NELF advocates adherence to the plain language of such provisions, to give full effect to legislative and administrative intent. In so doing, NELF also advances its goal of honoring legislative and administrative policy choices that balance the competing interests of employers and employees, here with respect to the timeliness of claims.

In this connection, NELF has filed amicus briefs in this Court in recent cases that also raise important issues of interpretation under Title VII and other federal statutes affecting employers. *See Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014); *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding the issue presented in this case.

SUMMARY OF ARGUMENT

In a claim for constructive discharge, as with most any other claim of discrimination or retaliation under Title VII, the administrative limitations period begins with the employer's last discriminatory or retaliatory act, not with the employee's resignation in response to that conduct. This is required by the plain language of the limitations provision applicable to federal-sector employees under the EEOC regulation, and by Title VII's general provision applicable to both private-sector and state employees. And the Court has already interpreted Title VII's provision as focusing on the

employer's challenged conduct, not on the injurious consequences to the employee. *Delaware State College v. Ricks,* 449 U.S. 250 (1980). *Ricks* should apply here because the relevant language in the EEOC regulation is synonymous with Title VII's limitations provision, and because neither provision treats constructive discharge claims differently from the "traditional" discrimination claim discussed in *Ricks.*

Moreover, the Court has observed that Congress would have been well aware of constructive discharge claims when it enacted Title VII. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 141-42 (2004). And yet Congress made no special allowance concerning the timeliness of constructive discharge claims. Therefore, Congress should be deemed to have rejected any differential treatment for the filing of constructive discharge claims by private-sector and state employees under Title VII. And the EEOC, in turn, should be deemed to have followed suit with its similarly worded provision for federal employees.

Suders also held that, in a constructive discharge claim under Title VII, the employee's decision to resign is *not* an action imputed to the employer. Instead, the resignation remains a separate act of the employee. Therefore, the resignation is not an "alleged unlawful employment practice" under Title VII or a "matter alleged to be discriminatory" under the EEOC regulation.

While the employer may indeed be liable in damages for the employee's resignation *as if* it were

a termination, *Suders* carefully distinguished the employer's monetary liability from any vicarious liability for the employee's resignation. The employer is liable in damages for the employee's reasonable resignation simply because the resignation is a foreseeable consequence of the employer's proven wrongful conduct.

After all, *Suders* explained that a constructive discharge claim is merely "an aggravated case" of discrimination or retaliation. The only difference between a constructive discharge claim and the underlying claim of discrimination or retaliation is the severity of the employer's wrongful conduct, and hence the applicable measure of damages. There is no reason, therefore, why the limitations period should be any different for the constructive discharge claim merely because the employee is seeking additional remedies that would not apply in the underlying claim of discrimination or retaliation.

Finally, *Suders* teaches that a constructive discharge claim is an objective inquiry, asking whether the employee's resignation was a reasonable response to the employer's challenged conduct. The facts necessary to determine such reasonableness are generally established once the employer has taken official action against the employee, or when a supervisor or co-worker has committed the last in a series of related acts of harassment against the employee before he resigns. At that moment in time, the employee is most likely on notice that resignation may be the only reasonable response to the employer's allegedly severe conduct. Therefore, this inquiry focuses on the severity of the employer's

disputed conduct. It does not concern the particular timing of each employee's resignation. Accordingly, the employer's conduct should begin the limitations period, not the employee's subsequent resignation in response to that conduct.

ARGUMENT

I. IN A CLAIM FOR CONSTRUCTIVE DISCHARGE UNDER TITLE VII, THE ADMINISTRATIVE LIMITATIONS PERIOD SHOULD BEGIN WITH THE EMPLOYER'S LAST DISCRIMINATORY OR RETALIATORY ACT, NOT WITH THE EMPLOYEE'S RESIGNATION.

At issue here is what event begins the administrative limitations period in a claim for constructive discharge under Title VII. Do the employee's administrative exhaustion requirements commence with the employer's last discriminatory or retaliatory act,[2] or do they commence instead with the employee's resignation?

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[2] Amicus intends "the employer's last act" to refer to either a single, "tangible" employment action or, in a hostile work environment claim, the last in a series of related acts of harassment occurring before the employee resigns. This is consistent with the Court's observation that a constructive discharge claim can arise from an official employment action, from a claim of supervisory harassment, or from a claim of co-worker harassment. *See Pennsylvania State Police v. Suders*, 542 U.S. 129, 148 (2004) ("[H]arassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts."). *See also id.*, 542 U.S. at 134 (discussing constructive discharge claim arising from either hostile work environment or tangible employment action, such as "a humiliating demotion, extreme

The petitioner, Marvin Green, was an employee of the United States Postal Service ("USPS"). *See Green v. Donahoe*, 760 F.3d 1135, 1137 (10th Cir. 2014). He alleges a constructive discharge in retaliation for having raised a prior claim of racial discrimination against his employer. *Id.* As a federal-sector employee, Green was required to initiate contact with an Equal Employment Opportunity ("EEO") counselor "within 45 days of the date of the *matter alleged to be discriminatory* or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. § 1614.105(a)(1) (emphasis added).

The USPS's actions that precipitated Green's alleged constructive discharge occurred no later than December 16, 2009, when Green signed a USPS agreement requiring him to relinquish his position immediately and either retire or accept a position at lower pay in a location about 300 miles away. *See Green*, 760 F.3d at 1138. On February 9, 2010, Green submitted his retirement papers. *Id.* On March 22, 2010, Green initiated counseling with an EEO counselor, alleging a constructive discharge. *Id.* This took place more than 45 days after the disputed employment action but less than 45 days after Green's resignation.

Notably, the lower court and the parties in this case have focused solely on "the matter alleged to be discriminatory" as the applicable regulatory language. *See* Brief of Respondent, at 13-14. This is significant because the "matter alleged to be

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cut in pay, or transfer to a position in which [the employee] would face unbearable working conditions.").

discriminatory" is substantially similar to the operative phrase "alleged unlawful employment practice," which occurs in Title VII's administrative filing requirement for private-sector and state employees. 42 U.S.C. § 2000e-5(e)(1) ("A charge [of discrimination or retaliation] shall be filed within one hundred and eighty days [or three hundred days, under certain circumstances] after the alleged unlawful employment practice occurred . . . .").

In NELF's view, the regulatory phrase "discriminatory matter" is synonymous with the statutory phrase "unlawful employment practice." Both terms identify the employer's allegedly wrongful conduct as the event that triggers the administrative limitations period in a Title VII claim. Therefore, resolution of the issue in this case, which concerns a federal-sector employee, should decide the issue of timeliness for *all* employees bringing claims of constructive discharge under Title VII.

A. According To The Plain Language Of The Limitations Provisions, The Employer's Precipitating Conduct Triggers The Administrative Time Period For Pursuing Title VII Claims.

As with the interpretation of a statute, the applicable regulation of the Equal Employment Opportunity Commission ("EEOC") should be confined to the plain meaning of its terms. See *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("When the statute's language is plain, the sole function of the courts . .

is to enforce it according to its terms.") (citation and internal quotation marks omitted). As discussed above, the regulation requires an employee to contact an EEO counselor within 45 days of "the matter alleged to be discriminatory." 29 C.F.R. § 1614.105(a)(1). "The matter alleged to be discriminatory" can only refer to the employer's actions that gave rise to the employee's Title VII claim, here a claim of constructive discharge.

This interpretation is confirmed by the second phrase in the same sentence of the EEOC regulation, quoted above, which refers to the effective date of a "personnel action" as an alternative triggering event. 29 C.F.R. § 1614.105(a)(1). *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (statutory terms should be interpreted in context). The phrase "personnel action" clearly refers to the employer's conduct as the event that triggers the limitations period. There can be no doubt, then, that the neighboring phrase, "the matter alleged to be discriminatory," also refers to the employer's conduct, not to the employee's response to that conduct.[3]

Tellingly, the EEOC regulation does not refer to the employee's response to the employer's

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[3] This is further confirmed by the EEOC's use of the same operative word "matter" in the first paragraph of the same regulation. *See* 29 C.F.R. § 1614.105(a) ("Aggrieved persons who believe they have been *discriminated against* on the basis of race, color, religion, sex, national origin must consult a Counselor prior to filing a complaint in order to try to informally resolve the *matter*.") (emphasis added). From this context it is clear that "matter" refers to the employee's claim that the employer took discriminatory action against him.

challenged conduct, or to any injury that the employee may have suffered as a consequence of that conduct. As with the cognate "alleged unlawful employment practice" language in Title VII's limitations provision, "the proper focus [of the limitations inquiry] is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful." *Delaware State College v. Ricks,* 449 U.S. 250, 258 (1980) (Title VII limitations period began when professor was denied tenure, not when he was subsequently discharged from college under terms of employment contract) (citation and internal quotation marks omitted).

Under *Ricks*, a constructive-discharge plaintiff's resignation is clearly an alleged injurious consequence of the employer's wrongful conduct. *Ricks* also emphasized that an employee's remaining on the job for a limited period of time after the employer's disputed conduct has transpired does not toll the running of the limitations period. "Mere continuity of employment [after the occurrence of the adverse employment action], without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Ricks*, 449 U.S. at 257 Therefore, the administrative limitations period should begin with the employer's conduct, not with the employee's subsequent act of resigning in response to that conduct.

While *Ricks* did not involve a constructive discharge claim, its holding should nonetheless apply here. Neither Title VII nor the EEOC regulation carves out an exception for the initiation

of constructive discharge claims. Instead, the relevant language refers generally to any "matter" or any "practice" alleged to be discriminatory as the event that triggers the administrative limitations period.

And, as the Court has observed, Congress would have been well aware of constructive discharge claims when it enacted Title VII. "By 1964, the year Title VII was enacted, the doctrine [of constructive discharge] was solidly established in the federal courts." *Suders*, 542 U.S. at 142. *See also id.* at 141 (discussing origins of constructive discharge claim in 1930's labor law cases). And yet Congress made no special allowance concerning the timeliness of constructive discharge claims. Therefore, Congress should be deemed to have rejected any differential treatment for the filing of constructive discharge claims by private-sector employees under Title VII. And the EEOC, in turn, should be deemed to have followed suit with its similarly worded provision for federal-sector employees, applicable here.

B. Under *Pennsylvania State Police v. Suders*, The Employee's Resignation Is Not An Action Imputed To The Employer, Even Though The Employer May Be Liable In Damages For The Resignation.

But *Ricks* is not the only precedent of this Court that effectively answers the question presented in this case. In *Suders*, discussed above, the Court held that, in a constructive discharge claim under Title VII, the employee's resignation is *not* an action attributable to the employer. "A constructive discharge involves both an employee's decision to leave and precipitating conduct: *The former involves no official action . . . .*" *Suders*, 542 U.S. at 148 (emphasis added).[4]

Since *Suders* holds that the employee's resignation is not an act imputed to the employer, the resignation is also not a "matter alleged to be discriminatory," or an "alleged unlawful employment practice," for purposes of the limitations periods under the EEOC regulation and Title VII. Accordingly, the employer's conduct triggers the limitations period in a claim for constructive

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[4] More precisely, *Suders* held that, in a claim of supervisory harassment culminating in a constructive discharge, the employee's resignation is *not* a tangible employment action. *See Suders*, 542 U.S. at 148. Instead, the resignation remains a separate act of the employee. *Id.* Therefore, the employer defending such a claim is not strictly liable and has recourse to the affirmative defense to liability that the Court had announced in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). *See Suders*, 542 U.S. at 148-49.

discharge, just as it would for most any other claim of discrimination or retaliation under Title VII. *See, e.g., Ricks,* 449 U.S. at 258 (filing period in Title VII claim for national-origin discrimination began when employer denied employee tenure).

While the employer may indeed be liable in damages for the employee's resignation *as if* it were a termination, the Court in *Suders* carefully distinguished the employer's monetary liability from any vicarious liability for the employee's decision. "To be sure, a constructive discharge is functionally the same as an actual termination in *damages-enhancing respects.* But when an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis, we here hold, calls for extension of the affirmative defense to the employer." *Suders,* 542 U.S. at 148 (emphasis added).

And so, while the employer may be liable for back pay, and possibly front pay, this is not because the prevailing employee's resignation becomes an act committed by the employer. Rather, the employer is liable for the employee's reasonable resignation simply because it is a foreseeable injury or consequence arising from the employer's proven wrongful conduct. "Under the constructive discharge doctrine, an employee's reasonable decision to resign is assimilated to a formal discharge *for remedial* purposes." *Suders,* 542 U.S. at 141 (emphasis added). *See also United States v. Burke,* 504 U.S. 229, 232 n.2, 237 n.8, 241 n.12 (1992) (discussing expansion of Title VII by Civil Rights Act of 1991 to include tort-like remedies).

After all, a constructive discharge claim is merely "an aggravated case" of discrimination or retaliation. *See Suders*, 542 U.S. at 146 ("The constructive discharge here at issue stems from, and can be regarded as an aggravated case of, sexual harassment or hostile work environment.")[5] In such a claim, the employee resigns and then alleges that the employer engaged in wrongful conduct that was so severe that the employee reasonably felt compelled to quit. *See Suders*, 542 U.S. at 147

The only difference, then, between a constructive discharge claim and the underlying claim of discrimination or retaliation is the *severity* of the employer's wrongful conduct, and hence the applicable measure of damages. "[T]he only variation between the two claims is the severity of the hostile working conditions." *Suders*, 542 U.S. at 149. That is, the constructive discharge claim is a dependent claim that rides "piggyback" on the underlying claim of discrimination or retaliation. In such a claim, the employee seeks additional recovery for his resignation as an alleged consequence of the employer's severe misconduct. *See id.*, 542 U.S. at 148-49. There is no reason why the limitations period should be any different for the constructive discharge claim merely because the employee seeks additional remedies that would not apply in the underlying claim of discrimination or retaliation.

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[5] While *Suders* concerned a hostile work environment-constructive discharge claim, that case should apply equally to a tangible employment action-constructive discharge claim. As discussed in n.2, above, *Suders* instructs that a constructive discharge claim can arise from either a single, official act of the employer or a series of harassing acts forming a hostile work environment. *See Suders*, 542 U.S. at 134, 148.

C. *Under Suders*, A Constructive Discharge Claim Entails An Objective Inquiry Focusing On The Severity Of The Employer's Conduct, Not On The Actual Timing Of A Particular Employee's Decision To Resign.

Suders provides further support here because it teaches that a constructive discharge claim entails an objective inquiry, asking whether the employee's resignation was a reasonable response to the employer's challenged conduct. "The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Suders*, 542 U.S. at 141.

The facts necessary to determine this reasonableness element of the claim are generally established once the employer has taken official action against the employee, or when a supervisor or co-worker has committed the last in a series of related acts of harassment against the employee before he resigns.[6] At that moment in time, the employee is most likely on notice that resignation may be the only reasonable response to the employer's allegedly severe conduct. Therefore, this inquiry focuses on the severity of the employer's disputed conduct. It does not concern the particular timing of each employee's resignation. Accordingly, the employer's conduct should begin the limitations period, not the employee's subsequent resignation in response to that conduct.

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[6] *See* n.2, above.

In sum, the plain language of the limitations provisions and this Court's relevant precedent establish that, in a claim for constructive discharge, as with most any other Title VII claim, the employer's disputed conduct begins the administrative limitations period. While the employer may incur liability for the employee's resignation, the resignation remains an act of the employee that is, at best, an injurious and compensable consequence of the employer's conduct. And the employee is typically on notice of this injurious consequence with the last discriminatory or retaliatory act of his employer.

CONCLUSION

For the reasons stated above, amicus respectfully requests that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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